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In the
Supreme Court of the United States

October Term, 1968

No. 1209

On Appeal From the Supreme Court of Ohio

STATE OF OHIO, BY JAMES V. BARBUTO,
Appellees,

vs.

CHARLES E. AND ROBERT E. BUCKLEY,
dba BUCKLEY'S AUTO WRECKING,
Appellants.

MOTION TO DISMISS OR AFFIRM

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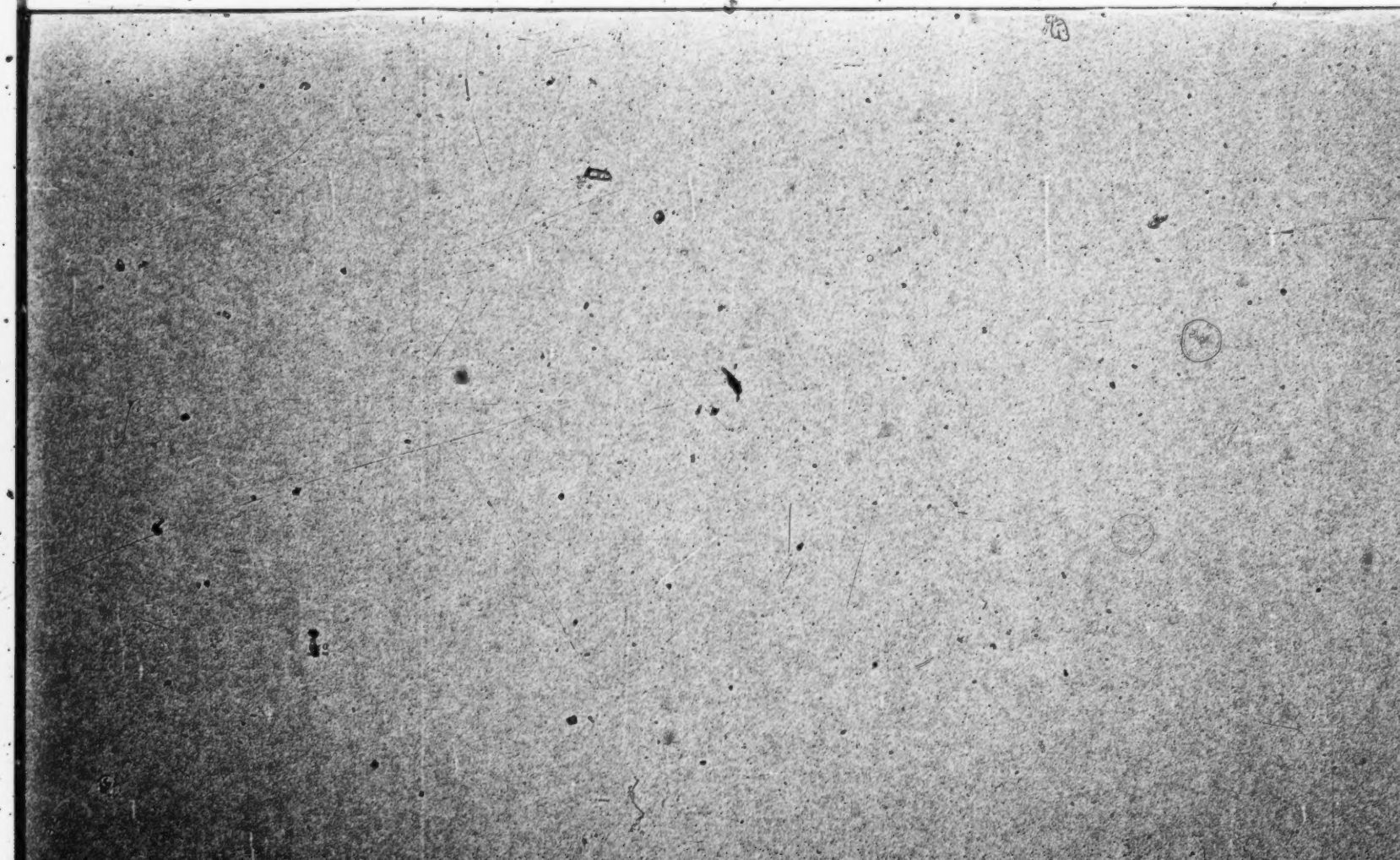

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STATE OF OHIO, BY JAMES V. BARBUTO,
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CHARLES E. AND ROBERT E. BUCKLEY,
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Appellants.

Appeal From The Supreme Court of Ohio

MOTION TO DISMISS OR AFFIRM

Paul W. Brown, Attorney General of Ohio, and successor in office to William B. Saxbe, appellee in this case, respectfully moves this Court, pursuant to Rule 16 of the Rules of the Supreme Court of the United States, to dismiss this appeal on the ground that it does not present a substantial federal question and that the judgment rests on an adequate non-federal basis, or, in the alternative, to affirm the judgment of the Supreme Court of Ohio on the ground that it is manifest that the questions on which the decision of the cause depends are so unsubstantial as not to need further argument.

STATEMENT OF THE CASE

On January 30, 1965, James V. Barbuto, Prosecuting Attorney of Summit County filed an application under Section 4737.11, Ohio Revised Code, in the Court of Common Pleas of Summit County to enjoin the named defendants, Charles E. and Robert E. Buckley, doing business as Buckley's Auto Wrecking, from further operation of their junk yard located at 2977 Manchester Road, Akron, Ohio, and to have said junk yard abated as a nuisance.

The application alleged facts to bring the operation of the junk yard within the junk yard licensing statutes, Sections 4737.05 to 4737.11, inclusive, and Section 4737.99 of the Ohio Revised Code. It was also alleged that the junk yard was being operated in violation of Section 4737.07, Revised Code, in that it was being operated without a fence of the specified height and construction and maintained so as to obscure the junk in the enclosure from the ordinary view of persons passing upon the road. It was further alleged that a fence constructed to enclose the junk yard was constructed using vertical fence posts of varying lengths extending above the top of the horizontal fencing, creating unsightly and disorderly construction in violation of Section 4737.09, Revised Code.

Defendants, by answer and cross petition, impleaded new parties defendant to include the Auditor of Summit County, the Sheriff of Summit County, the Prosecuting Attorney of Summit County and the Attorney General of Ohio. The answer contained a general denial and set up defenses to the effect that their business was exempt and excluded from the application of the junk yard statutes and denied operation of the business in violation of the statutes and also denied that said business was a nuisance.

Defendants further alleged that the junk yard statutes violated the Constitution of the State of Ohio and the Con-

stitution of the United States in that said statutes were based solely on aesthetic considerations and therefore an unconstitutional exercise of the police power. They further alleged that the junk yard statutes were not capable of uniform application throughout the State of Ohio and were arbitrary and unreasonable and that said statutes failed to contain any standards of guidance and constituted an unlawful delegation of legislative power to the Prosecuting Attorney and to the Attorney General to apply for an injunction and abatement of the defendants' business as a nuisance. It was also alleged that the junk yard statutes deprived defendants of the use of their property and that the statutes were indefinite and not capable of interpretation and compliance. It was further alleged that the requirements for the licensing of junk yards was improper, invalid and contrary to law.

By cross petition defendants asked for a declaratory judgment praying the court for an order finding them exempt and excluded from the operation of the junk yard statutes, and in the alternative asking the court to determine the construction and validity of the statutes and to declare the rights, status and other legal relations of the parties thereunder and to declare the statutes unconstitutional and ineffective and without force of law.

The case was heard before the Court of Common Pleas and upon consideration of the pleading, evidence and briefs of counsel, the court was of the opinion that the defendants Buckley came within the purview of the junk yard statutes. The court held that defendants had substantially complied with the statute, but that in the exercise of the court's common law equitable jurisdiction a nuisance did exist and the defendants were ordered to perform certain corrective measures. The court later held that the junk yard statutes were not unconstitutional on the grounds of

being purely aesthetic in character or in their requiring the licensing of junk yards. The court held that that part of Section 4737.05, Revised Code, *et seq.*, dealing with (a) definition of fences, and (b) creating a legislative nuisance by the lack of same, and (c) providing enforcement, are vague, indefinite and unenforceable and cannot be uniformly applied to all junk yards and where scrap processing dealers are specifically exempted from the statutes, the statutes are thereby discriminatory, and therefore unconstitutional, null and void. The court enjoined the defendants Auditor, Sheriff, Prosecuting Attorney and Attorney General from exercising the powers and duties conferred upon them by the junk yard statutes as against defendants Buckley.

The Attorney General and the Prosecuting Attorney of Summit County appealed on questions of law and the defendants Buckley cross-appealed on questions of law.

The Court of Appeals reversed the judgment of the trial court which found that that part of Section 4737.05, Ohio Revised Code, as it pertains to "(a) definition of fences, and (b) creating a legislative nuisance by the lack of same, and (c) providing enforcement" was unconstitutional null and void. In all other respects the court affirmed the judgment of the trial court and dissolved the injunction.

Upon appeal to the Supreme Court of Ohio the judgment of the Court of Appeals was affirmed in a decision dated December 31, 1968.

ARGUMENT

It is true that appellant, in his original answer and cross-petition, alleged that the Ohio junk yard statutes were violative of the Constitution of the State of Ohio and the Constitution of the United States, but this was done in general terms and without specificity as to the

federal question. It is only upon a reading of the brief which the appellant filed in the trial court in support of motion for temporary injunctions and restraining orders and brief on the merits that a party to the action might understand the nature of the constitutional questions raised.

The brief claimed the junk yard statutes to be unconstitutional and invalid for the reasons following in original sequence:

1. That "the base and purpose of the (junk yard statutes) is esthetic conditions". The brief argues that statutes based solely on aesthetic considerations are an unconstitutional exercise of the police power.

2. That "the (junk yard statutes are) violative of Article II, Section 26 of the Ohio Constitution requiring all laws of a general nature to have a uniform operation throughout the state."

3. That "the (junk yard statutes are) unconstitutional as an unlawful delegation of legislative power."

4. That "the (junk yard statutes are) violative of the due process clauses of the Constitution of the United States and of the Ohio Constitution." Here the brief conjectures that if the fence required by the junk yard statutes is not, or cannot be erected, the plaintiff (appellant) is deprived of the use of his property without due process of law.

The brief further claims unconstitutionality of the statutes in their application to the appellant's junk yard on the allegation of impossibility of compliance.

At the subsequent trial in the lower court on the merits, the record, as portrayed by the bill of exceptions, reveals no evidentiary matter adduced as a basis for argument on the question of constitutional validity of the Ohio junk yard statutes. The federal question must be an essential and integral part of the plaintiff's case. *Tennessee* v. *Union*

& Planter's Bank, 152 U.S. 454, 14 S. Ct. 654, 38 L. Ed. 511. Mere references to the federal Constitution, laws or treaties and mere assertions that a federal question is involved are not sufficient to confer jurisdiction. *Starin* v. *New York,* 115 U.S. 248, 6 S. Ct. 28, 29 L. Ed. 388.

The issue of whether or not a statute based on aesthetic considerations is an unconstitutional exercise of the police powers does not present a substantial federal question. It is now a commonly accepted principle of the law that the police power is an attribute of sovereignty which the states have not surrendered to the federal government but rather expressly reserved to the states by the Tenth Amendment to the Constitution of the United States, and the mode of exercising the power is left to the discretion of the state. *South Carolina* v. *United States,* 26 S. Ct. 110, 113; 119 U. S. 437, 50 L. Ed. 261; *Jordan* v. *Gaines,* 8 A. 2d 585; 136 Me. 291; *C. A. King & Co.* v. *Horton,* 156 N.E. 124; 116 Ohio St. 205. It must follow that it is clearly within the power of the state courts to determine the questions arising out of the exercise of its police power and no issue of a federal question arises unless the courts have been arbitrary or capricious in reaching their decisions.

In *Pacific States Box & Basket Co.* v. *White,* 296 U. S. 176, 56 S. Ct. 159, 80 L. Ed. 138, 146, dealing with the legislative exercise of the police power, it was said, "When such legislative action is called in question, if any state of facts reasonably can be conceived that would sustain it, there is a presumption of the existence of that state of facts, and one who assails the classification must carry the burden of showing by a resort to common knowledge or other matters which may be judicially noticed, or to other legitimate proof, that the action is arbitrary. The burden is not sustained by making allegations which are merely

the general conclusions of law or fact. Facts must be specifically set forth."

The issue of aesthetics as a basis for the exercise of the police power has been disposed of affirmatively as to the elements of this case by the Supreme Court of Ohio with strong precedent available from this Honorable Court in the case of *Berman* v. *Parker,* 348 U.S. 26, 33, 99 L. Ed. 27, 38. As a determination of a question arising out of the exercise of the state's own police powers, it seems evident that the decision is clearly a state matter and does not turn on a federal question.

With regard to the question of uniform enforcement, this was an issue raised in the appellant's original brief under the Ohio Constitution, as was the claim of discriminatory treatment of junk yards as opposed to scrap yards. These matters have been decided by the courts below on the basis of long standing Ohio law that where police legislation may be confined to certain measures the fact that it does not cover the entire field of similar possible abuses does not render such legislation invalid. *Yee Bow* v. *City of Cleveland,* 99 Ohio St. 269; *Grown* v. *City of Cleveland,* 125 Ohio St. 455; *City of Xenia* v. *Schmidt,* 101 Ohio St. 437. Furthermore, in *Central Lumber Co.* v. *South Dakota,* 226 U. S. 157, 160, it was said by Justice Holmes:

> "* * * If a class is deemed to present a conspicuous example of what the legislature seeks to prevent, the Fourteenth Amendment allows it to be dealt with although otherwise and merely logically not distinguishable from others not embraced in the law."

Even with reference to the Fourteenth Amendment, this Honorable Court has held in *McGowan* v. *Maryland,* 366 U. S. 420, 6 L. Ed. 2d 393, 399 that:

> "The Fourteenth Amendment permits the states a wide scope of discretion in enacting laws which affect

> some groups of citizens differently than others. The constitutional safeguard is offended only if the classification rests on grounds wholly irrelevant to the achievement of the state's objective."

The construction of state statutes belongs to the state courts, and is not a federal question, unless the state court gives such a construction to a state statute as to make it conflict with the Constitution or laws of the United States. See *Phoenix Insurance Co.* v. *Gardiner,* 11 Wall. 204, 20 L. Ed. 112.

The contentions that Ohio's junk yard statutes are vague and indefinite in the definition of fences, in creating a legislative nuisance by the lack of same, in their provisions for enforcement, and that they are unconstitutional as an unlawful delegation of legislative power, have been held to be without merit by the lower courts in the exercise of their duty to give a reasonable construction so as to give effect to the statutes as a whole. The Ohio courts followed the rule of *Eastman* v. *The State of Ohio,* 131 Ohio St. 1, which sets forth the following guidelines:

> "A statute cannot be held invalid for uncertainty if any reasonable and practical construction can be given to its language; mere difficulty in ascertaining its meaning, or the single fact that it is susceptible of different interpretations will not necessarily render it nugatory; it is the duty of its courts to endeavor by every rule of construction to ascertain its meaning and give full force and effect to, every enactment of the General Assembly not obnoxious to Constitutional prohibition.
>
> "Words in common use will be construed in their ordinary acceptation and significance and with the meaning commonly attributed to them."

The courts had little difficulty in finding the definitions capable of ordinary interpretation. This Honorable Court has pointed out in *Bauman* v. *Ross,* 167 U. S. 548, 17 S. Ct.

966, 42 L. Ed. 270, 290, that, with respect to acts of Congress, it is only when no other reasonable construction can be supported, that such an act can be declared to be unconstitutional and void, or invalid for any cause. It is respectfully submitted that the appellant has failed to show by the evidence or argument deducible from the evidence that "*no other* reasonable construction" can be supported to exclude the practical construction found.

The Ohio courts have also found that the so-called unlawful delegation of legislative power is not at all a delegation of legislative power, but merely the provision of enforcement procedures for failure of compliance. Moreover the Ohio General Assembly has not legislated a statutory nuisance, but rather, by clear and explicit terms of the statute itself, left that determination to the courts with remedial procedures encompassing relief to all parties.

The appellant, in seeking jurisdiction of this Honorable Court, relies now most strongly on the proposition that requiring the junk yard to be obscured from the ordinary view of persons passing on the state, county and township roads, is a taking of property without due process where the yard cannot be obscured due to topographical conditions, and that by extension of this argument to the property of the appellant the statutes are unconstitutional in their application to appellant's property for impossibility of compliance.

It is provided in Section 19, Article I of the Ohio Constitution that,

> "Private property shall ever be held inviolate but subservient to the public welfare."

The general rule in Ohio, as elsewhere, is that the General Assembly may provide that a particular use of land shall be unlawful even though that use had theretofore

been lawful. See *Ghaster, Inc.* v. *Preston,* 176 Ohio St. 425, 430, and *City of Akron* v. *Klein,* 171 Ohio St. 207. There is ample precedent in this Honorable Court for such a view. See *Buchanan* v. *Worley,* 245 U. S. 60, 38 S. Ct. 16, 62 L. Ed. 149, 155, wherein it was said, "The use of property and the liberty of contract are always subject to reasonable police regulations, and their enforcement does not deprive a person of property without due process of law." See also *Crawley* v. *Christensen,* 137 U. S. 86, 11 S. Ct. 13, 34 L. Ed. 620, 623. In the case of *McKee* v. *City of Akron,* 176 Ohio St. 282, it was held that depriving of an owner of land of the unrestricted use of his land will not necessarily amount to a taking of his property. It is respectfully submitted that the junk yard statutes of Ohio merely provide for a restraint on the manner in which the junk yard operator uses his land, and there has been no evidence in this case, nor argument deducible from the evidence that there has been a taking, other than the conjectural possibility of a situation where it would be impossible to obscure the junk within a junk yard enclosure by any type of fence or natural objects.

The appellant cites *Berman* v. *Parker* 348 U. S. 26, 33 for the proposition that "the rights of the property owners are satisfied when they receive that just compensation which the Fifth Amendment exacts as the price of taking." It must be remembered that *Berman* was a case involving the exercise of the power of eminent domain. The case of *Mugler* v. *Kansas,* 123 U. S. 623, 8 S. Ct. 273, 31 L. Ed. 205, 213 involved an interpretation of the Kansas prohibition law. There it was said,

> "As already stated, the present case must be governed by principles that do not involve the power of eminent domain, in the exercise of which property may not be taken for public use without compensation. A

prohibition simply upon the use of property for purposes that are declared, by valid legislation, to be injurious to the health, morals or safety of the community, cannot, in any just sense, be deemed a taking or an appropriation of property for the public benefit. Such legislation does not disturb the owner in the control or use of his property for lawful purposes, nor restrict his right to dispose of it, but is only a declaration by the State that its use by anyone, for certain forbidden purposes is prejudicial to the public interests. Nor can legislation of that character come within the Fourteenth Amendment, in any case, unless it is apparent that its real object is not to protect the community, or to promote the general well being, but, under the guise of police regulation, to deprive the owner of his liberty and property, without due process of law. The power which the States have of prohibiting such use by individuals of their property as will be prejudicial to the health, the morals, or the safety of the public, is not—and, consistently with the existence and safety of organized society, cannot be—burdened with the condition that the State must compensate such individual owners for pecuniary losses they may sustain, by reason of their not being permitted, by a noxious use of their property, to inflict injury on their community."

The problem of impossibility of compliance as to the appellant's property was effectively laid to rest by the trial court when it found that certain practical modifications to the existing fencing arrangement around appellant's property and a reasonable disposition of the junked cars therein would provide compliance with the statute. Moreover the court held that with such compliance it would be unnecessary to hear the Constitutional question. See Appendix A herein, Decision of the Court of Common Pleas of Summit County, which was first rendered in the trial of this case.

CONCLUSION

It is respectfully urged that this Motion to Dismiss be sustained for the reason that the case does not present a substantial federal question but rather that the judgment rests on an adequate non-federal basis through the state courts' interpretation and construction of the state's own police powers; or in the alternative that the judgment of the Supreme Court of Ohio be affirmed on the ground that it is manifest that the questions on which the decision of the cause depends are so unsubstantial in the light of well settled law as not to need further argument.

Respectfully submitted,

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APPENDIX

APPENDIX A

STATE OF OHIO
SUMMIT COUNTY } ss:

IN THE COURT OF COMMON PLEAS

Case No. 250017

STATE OF OHIO, by JAMES V. BARBUTO,
Prosecuting Attorney, Summit County, Ohio,
Plaintiff,

vs.

CHARLES E. and ROBERT E. BUCKLEY,
dba Buckley's Auto Wrecking, 2977 Manchester Road,
Akron 19, Ohio,
Defendant.

DECISION OF COURT

Court finds, first of all, that the defendant has made an effort to comply with the Statute and should be commended for this action. However, he falls short of full compliance within the meaning and purpose of the Statute, as follows:

1—The fence along Manchester Road on each side of the building should be increased in height by a two foot (2′) steel panel similar to the existing fence.

2—The Cove Road fence is satisfactory.

3—The Cormanny Road existing fence should be raised to close to ground level and then an additional two foot (2′) panel placed on top, increasing the height by two feet (2′).

4—The fence in the rear should be increased by a two foot (2′) panel.

5—All poles should then be cut level with the top of the fence.

6—Cars cannot be piled more than two (2) high.

7—No junked autos are to be left in the front on Manchester Road.

If the defendant desires to comply with the above order within thirty (30) days, it will be unnecessary to hear the Constitutional question raised in the cross petition and an entry may be submitted accordingly. Otherwise, counsel should notify the Court if additional proceedings are necessary.

/s/ T. W. MITCHELL
T. W. Mitchell, Judge
(By Assignment)